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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SONNY JOSEPH ANDERSON, Defendant and Appellant.	A149546 (Alameda County Super. Ct. No. H57458)

This case was returned to us from the California Supreme Court for reconsideration in light of statutory changes affecting the scope of the trial court's discretion with respect to sentencing. We previously affirmed Sonny Joseph Anderson**'s** convictions of second degree murder, evading an officer and causing death, evading an officer against traffic, leaving the scene of an accident, and assault on a police dog**,** rejecting claims of instructional error with respect to the murder conviction and insufficiency of the evidence to support the conviction of assault on a police dog. We again affirm the convictions, but we conclude remand is required for the trial court to exercise its discretion with respect to the prior strike.

BACKGROUND

Early in the evening of November 11, 2014, 14-year-old Ivan Cruz was killed in a crosswalk, struck by the car appellant was driving through a red light, on the wrong side of the road. Shortly before, Alameda County Deputy Sheriff Shaun Corey had attempted to make a traffic stop after becoming suspicious of a red Saturn he had first noticed when

it stopped quickly, "well over the limit line" of the intersection at 164th Avenue and East 14th, and appeared to abruptly change direction after the officer made eye contact with the driver, who seemed "extremely startled." After observing the Saturn drive into a parking lot, speed up and exit onto another street, Corey activated his emergency equipment; the car initially continued slowly as if looking for a place to pull over, then the driver gestured with his hand outside the window, accelerated, and "took off."

With Corey following, the Saturn travelled at speeds of up to 65 miles per hour on streets with a 25-mile per hour limit, through red lights and stop signs. Corey lost sight of it as he approached East 14th and 159th. As he drove southbound on East 14th, he saw "commotion" in the intersection with Ashland Avenue, a swerving vehicle that he believed to be the one he was pursuing. As he passed through the intersection, Corey saw the Saturn about a block and a half ahead of him, driving into the northbound lanes in a southbound direction, against oncoming traffic. Corey pulled over, terminated the pursuit and radioed the Saturn's location. He heard a radio report that a pedestrian had been hit in the intersection and drove back, finding a young man on the sidewalk on the west side of East 14th, just south of Ashland Avenue. Firefighters and paramedics had already arrived.

Ivan had been crossing the street at the intersection of East 14th Street and Ashland Avenue on his scooter, with his friends Diego Munoz and Victor Ocegueda-Sanchez behind him. They had waited for a green crossing light and were in the crosswalk. When Ivan was in the middle of the lane, Diego and Victor both saw a car coming toward them on the wrong side of the street. Diego called out to Ivan to move but the car was going too fast for him to react. Diego thought the car was going about 50 to 60 miles per hour; another witness estimated 40 to 50 miles per hour.

The car hit Ivan's leg, flipping him onto the hood and windshield, which sent him "flying" into the bus stop pole; he landed on the ground about 71 and a half feet from the point of impact with the vehicle. The car did not stop. Ivan died from multiple blunt injuries, consistent with having been hit by a car at high speed.

Video from surveillance cameras in the area shows the Saturn traveling on the wrong side of the road and entering intersection against a red light, and the pedestrian legally within the crosswalk. Based on the physical evidence, in particular a tire skid mark in the crosswalk, subsequent analysis indicated that the brakes had been applied suddenly, causing the wheels to lock and the vehicle to slide, its speed reduced from about 40-45 miles per hour at the point the wheels locked to 31 to 38 miles per hour at the point it hit Ivan. These estimates did not take into account that Ivan hit the pole before landing on the ground and therefore underestimated the speed at which the car was moving at the point of impact.

Victoria Estillore was in the car with appellant. They had been driving around, smoking cigarettes, weed and crystal methamphetamine, and appellant was "incredibly high."[1] Estillore noticed a police car and told appellant, who became "really frantic and panicked." When the officer activated his emergency lights, appellant slowed down for a moment and then speeded up, telling Estillore he was sorry but could not pull over because he had a record and priors, and could not go back to jail. Estillore tried to encourage appellant to pull over but he kept driving "really fast," narrowly missing getting into accidents, with the police officer in pursuit.

When appellant turned onto East 14th Street, driving in the opposite lane of traffic, Estillore was afraid they were going to crash and began directing appellant to help navigate around the cars coming toward them. There was a red light at the intersection of East 14th and Ashland and Estillore told appellant to get into the correct lane, but he continued through the red light, going "way too fast." Appellant swerved into the lane they should have been in, hitting a young boy Estillore had not seen until a few seconds before impact. Appellant kept driving, refused to stop to let Estillore out of the car, and got onto the freeway. He then stopped on an off-ramp in Fremont because the car had a

[1] Estillore acknowledged that she was on probation for possession of methamphetamine and had been struggling with a drug problem for years.

flat tire, and immediately ran away. Estillore collected her belongings and walked in the direction he had run, finding a cell phone that she later realized was appellant's.

The next day, November 12, the sheriff's office received information that appellant had recently visited an address in Newark and surveillance officers observed him enter a detached garage at that location. A team of officers surrounded the garage and ordered appellant to come out. After receiving no response to several announcements, Lieutenant James McGrail contacted the owner of the garage, who came out of his home and yelled for appellant to come out. A male voice responded but McGrail could not make out what he said. The owner gave McGrail the key and permission to enter the garage. Appellant was sitting, looking straight ahead at a wall. As will be explained at greater length, appellant failed to respond to continued orders to come out, including announcements that a police dog would be sent in if he did not, and the dog was dispatched to apprehend him. Due to appellant's resistance, the dog was dispatched three times before the police took him into custody.

Earlier on November 12, appellant had called his ex-girlfriend, Melissa Villalovos, sounding like "a wreck," as though "something had happened to him": He was whispering, but "a little frantic, a little panicked" and crying. He asked if she had seen the news. She had not, but looked and saw that a Saturn had struck and killed a young boy on Ashland Avenue in San Leandro. Knowing that appellant drove a Saturn, Villalovos "put two and two together" and thought appellant might have been responsible. Appellant told her the police had been trying to pull him over and he did not want to stop because he "had a warrant." Texts appellant sent to Villalovos prior to his arrest included, "I just wanted to say goodbye. My time on this planet is up," "I am going to attempt to make my peace with GOD and then I will end this journey," and "Why does God hate me I know I've done some bad things but I don't deserve this" and "I was gonna turn myself in on Friday to a program." Villalovos told him to erase all the messages and he replied, "I did. Did you?" Appellant's last texts were "Cops here goodbye" and again, "Goodbye."

Appellant was charged with murder (Pen. Code, § 187, subd. (a))[2] (count 1); vehicular manslaughter with gross negligence (§ 192, subd. (c)(1)), with alleged fleeing the scene of the crime (Veh. Code, § 20001, subd. (c)) (count 2); evading an officer and causing death (Veh. Code, § 2800.3, subd. (b)) (count 3); evading an officer against traffic (Veh. Code, § 2800.4) (count 4); leaving the scene of an accident (Veh. Code, § 20001, subd. (a)) (count 5); and assault on a police animal (Pen. Code, § 600, subd. (a)) (count 6). The amended information alleged that appellant had suffered seven prior felony convictions, five of which resulted in prison terms within the meaning of section 667.5, subdivision (b). The seventh alleged prior conviction, for first degree residential burglary (§ 459), was alleged to be a serious felony and strike offense. Appellant waived trial on the prior convictions and admitted the seventh prior, and the court found it true. On its own motion, the court struck the first six alleged prior convictions for purposes of sentencing. Subsequently, at sentencing, the court vacated the conviction for gross vehicular manslaughter while intoxicated and imposed a sentence totaling 37 years to life. This sentence consisted of consecutive terms of 30 years to life for the murder (15 years to life doubled due to the prior strike), two years for leaving the scene of an accident (one third middle term, doubled due to the strike), and five years for the prior serious felony conviction. The court imposed a concurrent term of one year in county jail on the misdemeanor assault on a police animal and stayed sentence on the remaining counts and enhancements pursuant to section 654.

After we affirmed the judgment, the California Supreme Court granted appellant's petition for review and transferred the case to us with directions to vacate our decision and reconsider the matter in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013). That legislation, which became effective after our prior opinion was filed, gave trial courts discretion to strike what had previously been a mandatory five-year enhancement for a prior serious felony conviction. (§§ 667, 1385.)

[2] Further statutory references will be to the Penal Code unless otherwise indicated.

DISCUSSION

I.

As indicated above, the jury returned verdicts of guilty on both the murder charged in count 1 and the offense of gross vehicular manslaughter while intoxicated, which was described by the court as a lesser included offense on that count. Appellant contends the trial court committed reversible error in failing to instruct the jurors, pursuant to CALCRIM No. 642 or otherwise, that they could not find him guilty of gross vehicular manslaughter while intoxicated unless they first found him not guilty of second degree murder, and that if they had a reasonable doubt as to which of the offenses he committed, they had to find him guilty of only the lesser offense.[3]

Appellant is correct that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) "In any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte." (*People v. Crone* (1997) 54 Cal.App.4th 71, 76.)

But gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder; it is a lesser *related* offense. (*People v. Sanchez* (2001) 24 Cal.4th 983, 985 (*Sanchez*).)[4] The principles upon which appellant relies come into play because a

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[3] CALCRIM No. 642 would have informed the jury that it could consider the different kinds of homicide in whatever order it wished, but the court could accept a verdict of guilty or not guilty of manslaughter only if all jurors had found appellant not guilty of second degree murder. (CALCRIM No. 642.)

[4] *Sanchez* explained that "the statutory elements of murder do not include all the elements of the lesser offense. Gross vehicular manslaughter while intoxicated requires proof of elements that need not be proved when the charge is murder, namely, use of a vehicle and intoxication. Specifically, section 191.5 requires proof that the homicide was committed 'in the driving of a vehicle' and that the driving was in violation of specified Vehicle Code provisions prohibiting driving while intoxicated." (*Sanchez, supra,* 24 Cal.4th at p. 989.)

defendant "cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act." (*Id.* at p. 987) A defendant *can* be convicted of both a greater offense and a lesser *related* offense based upon commission of the same act, although he or she generally cannot be punished for both such offenses. (*Id*. at p. 992.) CALCRIM No. 642 and *Dewberry* do not apply to lesser related offenses.

Appellant acknowledges all this. He argues, however, that because the trial court (erroneously) told the jury that gross vehicular manslaughter while intoxicated is a lesser included offense, it was required to give the instructions required for a lesser included offense. Appellant cites no authority for this novel proposition.

The trial court clearly erred in describing gross vehicular manslaughter while intoxicated as a lesser included offense. In fact, the trial court acknowledged that it was actually a lesser related offense in response to the prosecutor's argument that the court should not give CALCRIM No. 642 for precisely this reason.[5] Yet the jury instructions referred to gross vehicular manslaughter while intoxicated as a "lesser-included offense" and the verdict form for gross vehicular manslaughter while intoxicated described the offense as "a lesser included offense within the offense charged in count 1 of the Amended Information."

It makes no sense to say that because the court erroneously described gross vehicular manslaughter as a lesser included offense, appellant was prejudiced by the court's failure to instruct on the *Dewberry* principles. Erroneously characterizing an

[5] The court initially raised the issue of the lesser offense prior to instructing the jury, stating that it intended to instruct on vehicular manslaughter while intoxicated as a lesser offense of murder and noting that this offense carried a lesser sentence than murder but a greater sentence than the offense of vehicular manslaughter with gross negligence charged in count 2. Defense counsel requested that the instruction on vehicular manslaughter while intoxicated be given. The record reflects no comment from the prosecutor on this point. Subsequently, during a recess after the court had begun its instructions, the prosecutor argued that CALCRIM No. 642 should not be given because the lesser offense was related to, not necessarily included in, the charged murder, and the court agreed.

offense as "included" does not make it so. Since the court never explained the meaning of "lesser included offense" to the jury, the jury had no way to understand there was any particular consequence to the court's terminology, and because the lesser offense was in fact related, not included, CALCRIM No. 642 and *Dewberry* did not apply. Had appellant been charged with gross vehicular manslaughter, as well as second degree murder, there would have been no problem with the jury finding him guilty of both offenses.[6] As the jury found appellant guilty of second degree murder beyond a reasonable doubt, and the court dismissed the count of vehicular manslaughter while intoxicated, appellant suffered no prejudice.[7]

II.

Appellant next contends he was prejudiced by the trial court's error in giving a defective jury instruction regarding use of an uncharged offense to prove malice.

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[6] Respondent suggests that the trial court erred in instructing on the lesser related offense because it was not separately charged by the prosecution, although no prejudice resulted because the court dismissed the count. *People v. Birks* (1998) 19 Cal.4th 108, 134, 136 (*Birks*) held that a criminal defendant has no right to instructions on an uncharged lesser related offense over the prosecution's objection. In the present case, the prosecutor objected to instruction with CALCRIM No. 642 but does not appear to have objected to instruction on the offense of vehicular manslaughter while under the influence. The *Birks* court noted that its decision "does not foreclose the parties from agreeing that the defendant may be convicted of a lesser offense not necessarily included in the original charge." (*Birks*, at p. 136, fn. 19.) We offer no view on the trial court's decision to give the instruction on vehicular manslaughter while under the influence or to dismiss that count, as no issue has been raised by the parties on these points.

[7] Appellant argues that failure to give a *Dewberry* instruction can be prejudicial even though "the jury chose to convict the defendant of the greater offense over acquittal" or "the defendant was convicted of the greater offense on sufficient evidence," because the purpose of the requirement *Dewberry* imposed is "to make it clear to the jury that when the evidence is sufficient to support both the greater and the lesser offense, they have to choose one or the other." The cases appellant relies upon, *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335-1336, and *People v. Breverman* (1998) 19 Cal.4th 142, 178, footnote 25, do not involve *Dewberry* error but rather the trial court's refusal to instruct on a lesser included offense. In any event, as we have said, the premise of appellant's argument does not apply where the lesser offense is related, not included.

Prior to trial, the prosecution moved to admit evidence of several instances of appellant's prior conduct pursuant to Evidence Code section 1101, subdivision (b), including an April 2008 incident in which appellant attempted to evade sheriff's deputies who attempted to pull him over for vehicle code violations, engaging in a high speed chase that ended when appellant's car "became airborn[e] while passing over train tracks at high speed, disabling his car when it hit the ground." Appellant was arrested and charged with a number of offenses, and subsequently pleaded no contest to one count of driving under the influence (DUI) (Veh. Code, § 23152). The prosecution argued evidence of this incident was relevant to prove appellant understood that his "flight from the police at high speed in violation of multiple vehicle code sections and having ingested drugs was dangerous to human life," thereby showing that he acted with conscious disregard for human life and implied malice. The prosecutor clarified that he was not seeking to prove that appellant was *convicted* of driving under the influence, only that appellant admitted he had been driving while under the influence, which was relevant in the present case with respect to "knowledge of the danger and lack of mistake." The trial court ruled that it would admit evidence of appellant's conduct to show he knew the nature and consequences of evading the police, but not evidence of the conviction.

During the trial, Sergeant Jeremy Hamman testified about the 2008 incident. According to his description, appellant failed to yield when Hamman tried to pull him over after observing his car making a prohibited left turn and then "weaving in and out of its lane to both sides." With Hamman in pursuit, appellant drove at increasingly high speeds, running stop signs, hitting a set of trash cans and driving on the wrong side of the street. Driving at 65 or 70 miles per hour toward railroad tracks that crossed the roadway, appellant hit the tracks without braking; the vehicle "launched in the air and flew all the way across the railroad tracks and both lanes" of the road on the opposite side, canting to the left and landing on the left side, resulting in "quite a bit of damage" to the vehicle. Appellant then jumped out of his vehicle and ran. The camera system in the officer's vehicle captured the pursuit on video, and the recording was played for the jury. Hamman testified that appellant was taken into custody but did not say what offenses

appellant was charged with, and, aside from saying that the vehicle's weaving caused him to suspect the driver "could be driving under the influence," said nothing about appellant's mental or physical condition.

After Hammon's testimony and that of a subsequent witness, the court told the jury it wanted to read an instruction specifically pertaining to Hammon's testimony to "put it in perspective." The court then read CALCRIM No. 375: "The People presented evidence that the defendant committed an *offense* that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the *offense*. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by preponderance of the evidence if you conclude that it is more likely than not the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the *offense*, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant knew his act was dangerous to human life when he allegedly acted in this case.

"In considering this evidence, consider the similarity or lack of similarity between the *uncharged offense* and the charged offenses. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the *uncharged offense*, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The people must still prove every charge beyond a reasonable doubt."

The trial then proceeded with further witnesses. The instruction above was repeated when the court instructed the jury immediately before deliberations and was included in the written instructions provided to the jury.

Pointing to Hammon's description of observing appellant's vehicle moving "left to right, weaving in and out of its lane to both sides," causing the pursuing officers to

"believe that the person could be driving under the influence," appellant argues that the court's repeated references to an "uncharged offense," without identification, left the jury to speculate and, in light of Hamman's testimony, likely infer that appellant was convicted of a DUI. According to appellant, "[m]any jurors know that when someone is sentenced for a DUI the court normally gives a '*Watson* admonition' that [¶] 'being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder."[8] From these premises, appellant posits that the court's "other offense" instruction "may very well have misled the jury to conclude that, as a result of 'the offense' he committed in 2008, [appellant] knew that driving under the influence was dangerous to human life, and that he consciously disregarded that danger" in the present case.

Appellant's premises are speculative. There was no evidence that appellant was in fact under the influence during the 2008 incident, charged with driving under the influence on that occasion or convicted of a DUI. Hammon's testimony may have supported a suspicion that appellant was driving under the influence, but the focus of the testimony was appellant's attempt to evade the officers and the extraordinarily reckless manner in which he was driving. It is at least as likely jurors would have assumed the "offense" involved that conduct and not necessarily driving under the influence.

Appellant's suggestion that jurors would have inferred that he was not only convicted of DUI in the 2008 incident but also specifically admonished that continuing to drive under the influence could lead to murder charges if someone was killed as a result

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[8] Although appellant provides no explanation or citation, the admonition derives from *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*), and is required to be given to defendants convicted of driving under the influence. (§ 23593; see Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2173 (2003-2004 Reg. Sess.) as introduced Feb. 18, 2004.)

is also speculative. To be sure, section 23593 requires trial courts to give this admonition to a person convicted of driving under the influence, but that legal requirement provides no basis for assuming that "many jurors" know about it. Moreover, since absolutely no evidence was presented at trial that the 2008 incident led to a DUI conviction, or that a defendant convicted of DUI is given the admonition appellant describes, relying upon these assumptions would have violated the court's instructions for the jury to base its verdict only on evidence presented during the trial and law described by the judge, and not to receive information from any other source.[9] We presume, of course, that the jurors followed the court's instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

Moreover, appellant's suggestion that the jury may have been led to conclude that appellant "knew that driving under the influence was dangerous to human life" and consciously disregarded that danger in the present case "as a result of 'the offense' he committed in 2008" overstates the comparative strength of the inference to be drawn from a DUI conviction and the "*Watson* admonition" it may have entailed. Even without a "*Watson* admonition, it is "presumed that [a defendant is] aware of the hazards of driving while intoxicated." (*Watson, supra,* 30 Cal.3d at p. 300.) At least in circumstances as dramatic as the 2008 incident, the awareness of danger depends more on the underlying conduct than on the fact of a conviction for DUI.

We also disagree with appellant's apparent assumption that while driving under the influence can be equated with implied malice, driving "dangerously" cannot. It cannot be seriously contended that leading pursuing officers on a high-speed chase including running stop signs, hitting objects in the road, driving on the wrong side of the

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[9] At the outset of the trial, the court instructed that "[o]ur system of justice requires that trials be conducted in open court with the parties presenting the evidence and the judge deciding the law that applies to the case. It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant and the parties will not have had the opportunity to examine and respond to it. [¶] Your verdict must be based only on the evidence presented during the trial in the court and the law as I provide it to you." The jury was directed both at the beginning of trial and before deliberations not to "investigate the facts or the law or do any research regarding this case."

street and hitting railroad tracks with sufficient force to propel the vehicle into flight, with damage to the vehicle upon landing, does not constitute "an act presenting a great risk of harm or death" (*Watson, supra,* 30 Cal.3d at p. 301) that would be apparent to the driver—even if it did not involve or result in a conviction for DUI.[10]

Nor are we persuaded by appellant's assertion that there is a reasonable probability the jury would not have found implied malice if the court had "given the prescribed form of CALCRIM [No.] 375," which offers the terms "act," "conduct" or "behavior" as alternatives to "offense" and contains a direction to "insert description of alleged offense." As we have said, the jury could easily have concluded the offense was related to appellant's evasion of the police and reckless driving, not necessarily driving under the influence, and the inferences of awareness and conscious disregard of danger to be drawn from the 2008 incident depend on the conduct, not necessarily upon a conviction resulting from that conduct.

"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Appellant has not done so. Nor has he shown a reasonable probability that the that the jury would not have found him guilty of murder if the court had worded the challenged instruction to refer to "act" or "conduct" rather than "offense."

III.

[10] Defense counsel argued at trial that the lesson appellant learned from the 2008 incident was that he could engage in such conduct and not expect to cause harm because "nothing happened" as a consequence of his evasion, speeding and driving on the wrong side of the road on that occasion. This was hardly a convincing argument. Appellant's luck in failing to cause more harm in 2008 surely does not support a conclusion that he was unaware of the risk he posed by driving, high on methamphetamine and marijuana, at high speed through stop signs and red lights, in an attempt to evade a pursuing law enforcement officer.

Appellant contends the evidence was insufficient to support his conviction for assaulting the police dog because "the undisputed evidence shows he did so in self-defense." Additionally, he contends he was denied due process in that the court failed to define the term "maliciously" used in the instruction.

Section 600, subdivision (a), provides that "[a]ny person who willfully and maliciously and with no legal justification strikes, beats, kicks . . . a dog under the supervision of, a peace officer in the discharge or attempted discharge of his or her duties . . . is guilty of a public offense." The jury was instructed that, among other things, the offense required proof that the defendant "willfully and maliciously, and without legal justification, struck and[/or] kicked the police animal in a manner as to be capable of producing injury or likely to produce injury." It was further instructed that self-defense was a defense to the charge of assaulting a police animal, that the prosecution had the burden of proving appellant did not act in self-defense, and that appellant was not guilty if he "reasonably believed that he was in imminent danger of suffering bodily injury," "reasonably believed that the immediate use of force was necessary to defend against that danger," and "used no more force than was reasonably necessary to defend against the danger." With regard to the last of these requirements, appellant was "only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation."

Police Officer Nick Mavrakis, the canine handler, testified that when he looked into the garage appellant was refusing to come out of, he saw appellant sitting on a "recliner-type sofa chair," facing away from Mavrakis. Mavrakis loudly announced his presence, telling appellant "Come out now or I'll send the dog in for a search. If he finds you he will bite you." Receiving no response, Mavrakis repeated the command for appellant to come out and, as appellant again did not respond, deployed his "K-9," Ares. The officer could see only the top of appellant's head and part of his left arm; he did not know whether appellant had any weapons, and he was concerned about officer safety. Ares quickly found appellant and "grabbed a hold of [his] upper left arm." Appellant stood up with the dog "still hanging on to his left arm and he began to punch and kick"

the dog; Ares's front legs were lifted up in the air while his hind legs remained on the floor. The other officers began yelling for appellant to stop kicking and punching the dog, and Ares let go and ran toward them. Mavrakis redirected Ares to himself and as the dog was responding, saw that appellant was standing with his fists clenched, staring at the officers, and not complying with orders to show his hands and get down on the ground. Mavrakis again directed Ares to apprehend appellant. Ares grabbed appellant on the same part of his arm and pulled him down to the ground on top of "a bunch of debris." Mavrakis removed Ares from appellant as other officers took hold of appellant and ordered him to show his hands, which were underneath his body. After appellant refused "numerous" requests to show his hands, Mavrakis deployed Ares again and "[p]retty quickly" after the dog reattached to the same location on appellant's arm, appellant released his arms. Mavrakis explained that he deployed the dog this last time because the garage looked "like a tornado had gone through it," with debris everywhere, "improvised weapons that could be picked up," and the possibility of a weapon on the chair or on appellant's person.

Appellant was arrested and taken to Eden Hospital, where it took about 10 minutes for his wounds to be cleaned. He did not need stitches.

The only question on appeal is whether substantial evidence supported the jury's verdict. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Plainly, it did. Appellant refused to comply with orders to come out of the garage even after being warned that if he did not, the K-9 would be sent in and appellant would be bitten. When Ares grabbed appellant's arm, appellant began kicking and punching the dog despite officers yelling at him to stop. This was not, as appellant describes it, a clear case of self-defense against an attacking dog, and his description of himself as sitting still in a chair and doing nothing to "provoke [the dog's] attack" mischaracterizes the situation. Appellant was warned exactly what would happen if he refused to comply with police orders, and Ares did precisely what he was trained to do; the dog was not mauling appellant, he was attempting to secure and hold appellant for the officers.

Appellant quotes the testimony of Lieutenant McGrail, the officer in charge of the unit sent to arrest appellant, that appellant was "hitting or kicking, trying to get away from the dog," as evidence that he acted in self-defense. In context, McGrail's testimony gives a different impression. McGrail testified that in continuing to simply stare forward in the face of the officers' "loud" commands, appellant "wasn't acting as a reasonable person would act given the situation" and "[g]iven the totality of what we had, I felt he was baiting us to come in for a fight." Asked how appellant responded to the dog attempting to apprehend him, McGrail replied, "With a struggle. Out of my peripheral, he wasn't just laying calmly, he was fighting back with the dog. It looked like he was hitting or kicking, trying to get away from the dog." The jury obviously rejected the theory that appellant acted in self-defense with only the force a reasonable person would have believed necessary,[11] and the evidence supports this conclusion. Appellant could have avoided any contact with Ares by complying with the officers' commands to come out of the garage, and could have minimized contact with the dog by complying once he was apprehended.

Finally, appellant's contention that the trial court erred in failing to define the term "maliciously" as used in the jury instruction defining this offense was rejected in *People v. Adams* (2004) 124 Cal.App.4th 1486, because "the term 'maliciously' as used in

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[11] Appellant did not testify at trial, and the assault charge was discussed only briefly in the attorneys' closing arguments. Defense counsel told the jury he had no idea why appellant was charged with assaulting the dog because appellant was doing nothing when the police sent the dog in, and only defended himself "from excessive force of the dog." The prosecutor argued that the police sent the dog "to apprehend a murder suspect who wasn't cooperating" and it "should have never gotten to the point of hitting the dog" because appellant knew the police were there and should have surrendered. The jury also heard evidence, however, of a recorded jail conversation in which appellant told his visitor a radically different story than what the police officers described at trial—that the dog first tried to grab his leg, and as he started screaming and "flailin' around," the police came in, "knocked [him] out of the chair and flat down on the ground" and started "hittin' [him] with fuckin' batons" as he screamed "I'm not resisting." The jury's verdict demonstrates that it believed the officers' description of the events and rejected appellant's.

section 600, subdivision (a), does not have a technical meaning different from its common meaning." " ' "[T]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification." ' " (*Adams*, at p. 1493, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 574.) The trial court has a sua sponte duty to provide explanatory instructions only when a term has " 'a technical meaning that is peculiar to the law.' " (*Adams*, at p. 1493, quoting *People v. Howard* (1988) 44 Cal.3d 375, 408.)

IV.

Appellant's sentence included a five-year prison term for his prior serious felony conviction pursuant to section 667, subdivision (a). When appellant was sentenced, the trial court was required to impose this sentence enhancement; it had no discretion to strike the prior in this context. Subsequently, sections 667, subdivision (a), and 1385 were amended to remove the prohibition against striking a prior serious felony conviction in connection with a section 667, subdivision (a), enhancement. (Stats. 2018, ch. 1013, § 1.) The amendments became effective on January 1, 2019, and apply to all cases not yet final at that time. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.)

Appellant is entitled to the benefit of the amendments. " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391, quoting *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) " '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, quoting *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228), unless " ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so." ' " *(McDaniels,* at p. 425, quoting *People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) "Here, the record does not 'clearly indicate' the court would not have exercised discretion to strike the firearm allegations had the court known it had that

discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) The court in the present case expressly noted that it had "very little discretion" with respect to the sentence, and gave no indication of its view on the appropriateness of the length of the sentence. Remand is required.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion in determining whether to strike the section 667, subdivision (a), enhancement. If the court elects to do so, it shall resentence appellant and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. If the court elects not to strike the enhancement, appellant's original sentence shall remain in effect.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Miller, J.

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